

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of  
the Interior, et al.,

Defendants.

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) No. 1:96CV01285  
) (Judge Lamberth)  
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**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ENLARGEMENT  
OF TIME WITHIN WHICH TO FILE SUPPORTING ATTORNEY AND EXPERT  
WITNESS DOCUMENTATION RE EAJA FEE APPLICATION**

On October 9, 2003, Plaintiffs filed a Request for an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act ("Request"). The Request is defective, among other reasons, for failing to include an itemized statement of the attorney fees and expenses sought, as required by the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000). Recognizing this defect, on October 23, 2003, Plaintiffs filed a Motion for Enlargement of Time Within Which To File Supporting Attorney and Witness Documentation Re EAJA Fee Application ("Motion for Enlargement").

In the Motion for Enlargement, Plaintiffs argue that because "plaintiffs have much to do over the coming weeks and months given the schedule this Court has set forth in its September 25, 2003 Trial 1.5 Order" they should not be required to comply with EAJA and file a proper application that includes the required itemized statement of requested fees and expenses. See Motion for Enlargement at 1.<sup>1</sup> Instead, without any citation to authority for their novel approach,

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<sup>1/</sup> Plaintiffs do not identify the tasks that were assigned to them in the Trial 1.5 Order which prevented them from filing a complete EAJA application. Since the close of the phase 1.5 trial,

they propose that the Court first declare their entitlement to fees and then 60 days later they will reveal the fees they are requesting. See id. at 3.

Plaintiffs misunderstand the requirements of EAJA. The statement of itemized fees and expenses is not merely “supporting documentation” for an application. See Motion for Enlargement at 2. The statement is a necessary part of the application itself. See 28 U.S.C. § 2412(d)(1)(B) (“A party seeking an award of fees and other expenses shall . . . submit to the court an application for fees and other expenses which shows . . . the amount sought, including an itemized statement from any attorney or expert witness . . . stating the actual time expended and the rate at which fees and other expenses were computed.”). Such information “is essential not only to permit the District Court to make an accurate and equitable award but to place government counsel in a position to make an informed determination as to the merits of the application.” National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir.1982).

Plaintiffs’ new approach to EAJA applications does not permit the Court, or the government, to make informed determinations about the Request. Decisions about entitlement can be affected by the nature of the actual fees and expenses that are sought. For example, if Plaintiffs include in their itemized statement a request for fees associated with issues that are unrelated to the matters on which they claim to have prevailed they would not be entitled to such fees, even if these matters arose within the “appropriate temporal parameters,” Motion for

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Plaintiffs have noticed fourteen depositions and served thirteen sets of requests for production of documents. This discovery onslaught was neither scheduled nor authorized in the Court’s September 25, 2003 Order and certainly does not excuse Plaintiffs’ failure to complete a proper EAJA application.

Enlargement at 3, on which Plaintiffs seek an initial ruling from the Court. Plaintiffs' newly invented approach to EAJA applications does not comply with the requirements of EAJA and should be rejected.<sup>2</sup>

In any event, as discussed in Defendants' Opposition to the Request (filed October 23, 2003), Plaintiffs' entire Request is premature under EAJA because no final judgment has been entered in this case. See Opposition at 7-9. The Motion for Enlargement is similarly premature. Plaintiffs claim that, because they are filing an "interim" EAJA request, no time limits apply to their Request, and that it is only "in an abundance of caution" that they are seeking an enlargement of time in which to file "supporting documentation." Motion for Enlargement at 2. The thirty day period for filing an EAJA application runs from a final judgment. See 28 U.S.C. § 2412(d)(1)(B). Because there has not been a final judgment in this case the thirty day clock has not yet begun to run.<sup>3</sup>

Plaintiffs should not be granted additional time to file information that was required to be included in their Request. Instead, they need to withdraw their defective Request and file a timely, complete EAJA application after a final judgment has been entered in this case, if they still contend at such time that they are entitled to relief under EAJA.

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<sup>2</sup> Plaintiffs claim that their new bifurcated approach to EAJA applications will save "Court time" and is a "more efficient use of judicial and party resources." Motion for Enlargement at 1-2. It may indeed be less burdensome on Plaintiffs to file an incomplete EAJA application. It is difficult to understand how any Court time is saved by reviewing their application piecemeal.

<sup>3</sup> Plaintiffs neglect to mention that if their "abundance of caution" thirty day rule were applied to the Phase 1 judgment, their Request would be tardy.

## **CONCLUSION**

For these reasons, Plaintiffs' Motion for Enlargement should be denied.

Dated: November 6, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 6, 2003 the foregoing *Defendants' Opposition to Plaintiffs' Motion for Enlargement of Time Within Which to File Supporting Attorney and Expert Witness Documentation re EAJA Fee Application* was served by Electronic Case Filing, and on the following who are not registered for Electronic Case Filing in the manner indicated:

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Defendants.	)	
_____	)	

**ORDER**

This matter comes before the Court on Plaintiffs' Motion for Enlargement of Time Within Which To File Supporting Attorney And Expert Witness Documentation Re EAJA Fee Application. Upon consideration of the Motion for Enlargement, the responses thereto, and the record in this case, it is hereby

ORDERED that the Motion for Enlargement is DENIED.

SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
ROYCE C. LAMBERTH  
United States District Judge

cc:

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